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No. 335

In the Supreme Court of the United States

OCTOBER TERM, 1946

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF RAILWAY LABOR EXECUTIVES' ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE

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The Railway Labor Executives' Association respectfully presents this motion that leave be granted to the said Association to file the accompanying brief as *amicus curiae* in the above-captioned case, and in support thereof shows the Court:

I. Pursuant to paragraph 9 of Rule 27 of the Rules of this Court the undersigned counsel for the Railway Labor Executives' Association requested the consent of the Acting Solicitor General and of counsel for the respondent to the filing of this brief. The Acting Solicitor General granted his consent, but counsel for the respondent declined to do so.

II. The Railway Labor Executives' Association represents 19 of the 21 standard railway labor organizations. A list of the organizations represented in the Association is set forth in the Appendix. These organizations are the collective representatives under the Railway Labor Act of the employees in the great bulk of the jobs on which trainees are engaged on respondent and on other railroads where similar practices prevail. They therefore represent many persons who will be very substantially affected by the Court's determination and whose interests are not identical with the interests represented by either of the parties.

This motion is made and the attached brief submitted for filing in No. 335 since it is in that case that work under the jurisdiction of these organizations is involved. However, since that case is being heard jointly with No. 336, there have been included, where appropriate, references to the record in No. 336.*

WHEREFORE we respectfully pray that the Court waive the requirement of consent as set forth

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* We have followed the system used in the Government's brief of designating the record in No. 335 by "CR" and that in No. 336 by "PR."

in paragraph 9 of Rule 27 and that leave be granted to file the accompanying brief.

Submitted by

LESTER P. SCHOENE,
Attorney for Amicus Curiae.

BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE

STATEMENT

It is not our purpose to restate the facts or to reiterate the argument made by the Government, to which we subscribe, nor to add to the authorities that have been brought to the Court's attention by the parties. We seek only: I, to place before the Court our analysis of the determinative issues, and II, to clear up certain misconceptions concerning the employees' participation in and attitude toward the establishment of the practices of which the Administrator complains.

ARGUMENT

I.

Analysis of Determinative Issues

A. *If the Fair Labor Standards Act means what it literally says, the Court below is in error in not holding the trainees involved to be employees.*

Under the applicable definitions in Section 3 of the Act an " 'Employee' includes any individual

employed by an employer" and " 'Employ' includes to suffer or permit to work." There is no denial that respondent is an employer under the Act and that it does suffer and permit trainees to work. Both in this case and in No. 336 the courts below find it necessary to admit, either expressly, or impliedly by adding qualifying words to the statutory definition, that if the definition of "employ" is to be literally applied these trainees must be held to be employees (PR. 137, CR. 381).

We do not understand respondents to urge otherwise. Instead the argument in support of the decision below, both in this case and in No. 336, in the opinions below and on the part of respondents here, although variously stated comes in summary to this: The Act's definition of "employ" cannot be taken literally because this would give employee status to anyone who exerts any energy anywhere which the alleged employer had the power to prevent but did not prevent. Since such a construction would be absurd it is necessary to limit the application of the definition to situations where there is an express employment contract or where one can be implied from a balancing of the relative benefits directly and primarily flowing to employer and workman from the doing of the work. Hence, if the workman derives the benefit of learning a job and the employer could get the specific work of a trainee done as advantageously by others a trainee is not "employed" within the definition unless there is an express contract of employment. The argument then addresses itself to the applicability of the learner regulations provided in Section 14 and points out that they apply only where

learners are *employed* within the definition as limited in the preceding argument. Support of the decision below is therefore wholly dependent upon the proposition that sensible construction of the definition of "employ" requires that the term be limited to the degree that the argument suggests.

B. *Construction of the Act requires no such circumscription of the term "employ" as the argument in support of the decision below asserts.*

It may readily be agreed that the Act's very broad definition of "employ" was not intended to embrace all exertion of energy that the alleged employer had the power to prevent but did not prevent. But it does not follow that the alternative is a construction that virtually reads the definition out of the Act.

All that is necessary to avoid an obviously unintended application is to have it understood that "to work" means the doing of work which, in some substantial sense, is the work of the employer. *Cf. Linstead* v. *Chesapeake & Ohio Ry. Co.*, 276 U. S. 28. Such an understanding of the term "to work" at once disposes of such hypothetical cases as that of the permittee who enters upon the premises to do a repair job of his own or to do the work of a third party, and that of the bona fide student receiving instruction in a training school where only make-believe work is done. In the case of the novelist (PR. 138) it would make employee status depend on whether he was a mere observer or whether he participated in the doing of the work. We are not shocked at the prospect of holding the

Act applicable to such a novelist who is expected to and does participate in doing the work, for it is our understanding that it is the purpose of minimum wage legislation to prevent work at subminimum wages regardless of whether the motive impelling the acceptance of such work is economic necessity, hope of collateral reward, or anything else.

The court below (CR. 381) uses the terms "work for it" and "worked for appellee." Such terms would be unobjectionable if understood to be synonymous with "doing the appellee's work." But it is plain from the decision that the court did not so understand them. The controlling test of whether the trainees "worked for appellee" as used by the court below is made to depend upon whether the appellee or the trainee derived the most immediate and direct benefit from doing the appellee's work in the particular way in which it was done.

The test of how advantageous or lacking in advantage to the employer or the workman may be the particular arrangement under which the work is done is irrelevant to a determination of whose work it is. It is sufficient that the employer chose to have the work done and chose to have it done under the arrangement. Little imagination is required to conceive of innumerable situations in which an employer, in consideration of more remote advantages, real or supposed, would choose to have work done under arrangements which in relation to the performance of the particular work are less efficient than available alternative arrangements.

C. *The record conclusively shows that the trainees here involved were expected to and did do the respondents' work.*

Both in this case and in No. 336, paragraph VIII of the complaint alleged that "said employees are actively engaged in the performance or operation of some essential phase of defendant's activities or facilities." (CR. 4-5, PR. 4.) The findings of the district courts in both cases, not disturbed on appeal, put it beyond dispute that this allegation was proved: "The student learns not only by observation, but by actually performing the duties of the employment he seeks" (CR. 366); "gradually permitting him to do the actual work under supervision." (PR. 123.)

We do not contend that the construction suggested in the preceding section affords a magic formula by which all close cases automatically solve themselves. At the outer limits of the Act's application there will, under any construction, be debatable cases that may be difficult to decide. But it is submitted that the construction suggested is susceptible of application so as to avoid the inclusion of any situations which Congress clearly did not intend to cover. And the present case presents no debatable issue as to whether the work the trainees do is respondent's work.

D. *Weighty considerations of judicial administration require that the balancing of relative advantages to employer and trainee be left to the Administrator.*

A holding that these trainees are employees, of course, does not mean that the minimum wage must

necessarily be paid. Congress foresaw that precisely such considerations of relative advantage to employer and trainee as are urged by respondents here might in some circumstances have a proper bearing upon whether the payment of a minimum wage should be required. It must be obvious, however, that such relative advantage and disadvantage is susceptible of infinite variation from instance to instance. No doubt recognition of that fact underlay, at least in part, the decision of Congress not itself to undertake to prescribe the precise conditions under which subminimum wages would be permitted, but, by Section 14 to commit the whole subject to determination by the Administrator case by case.

Acceptance of the decision below and of respondents' argument here would largely remove these infinitely variable considerations from the province of the Administrator and impose them upon the courts as tests of the Administrator's jurisdiction. The Act did place upon the courts a very substantial function in the enforcement of its requirements. But the adjustment of its requirements to the great variety of special considerations involved in the employment of learners, of apprentices, and of certain messengers was clearly made the function of the Administrator by Section 14. Adoption of a construction of the Act that would require the courts to take over that function, too, under the guise of passing on the Administrator's jurisdiction would be an unwarranted addition to an already heavy load. Such a construction is to be avoided where, as here, an alternative construction is available.

II.

Misconceptions Concerning the Employees' Participation in and Attitude Toward the Establishment of the Practices of Which the Administrator Complains

Without any direct support in the evidence, but by innunendo, implication and assumption, there has apparently entered into the case an impression that the practice of not recognizing trainees as employees is in conformity with the collective bargaining contracts made by the railway labor organizations and hence, presumably, meets with their approval. (CR. 366, 50, 58, 84.) It would be more accurate to say that in this respect the carriers have frequently failed fully to carry out their collective bargaining obligations under the Railway Labor Act as well as their obligations under the Fair Labor Standards Act.

At various times and on various carriers over a long period the railway labor organizations have been confronted with the problem of the nonrecognition of on-the-job learners as employees. They have sought with varying degrees of success to have them recognized and to have them paid at the established rates for the jobs, or, where appropriate, to have a suitable classification established. The record affords no basis for a full discussion of the situation and hence we must confine ourselves to the discussion of the rather meager evidence of record and let the position taken in this brief attest the fact that the organizations do not approve of nonrecognition.

The failure of a carrier to recognize trainees as employees covered by the agreement governing wages, rules, and working conditions (CR. 50, 366)

is just as consistent with a carrier refusal to grant employee demands as it is with employee approval of the practice and hence no such approval can be inferred. And the time as of which the accumulation of seniority begins (CR. 50, 366) is completely irrelevant to the determination of employee status. Seniority fixes relative rights among the individuals in a group, and hence it is immaterial to these relative rights whether they all date the accumulation of seniority from the date of entry on the job or all date it from the time they begin working beyond the probationary period. But deferment to the latter date serves to avoid the accumulation of rights by those who do not survive the probationary period. For a variety of reasons there are numbers of situations in which the beginning of the accumulation of seniority is not coincident with entry on the job.

There was read in evidence (CR. 84-85) a portion of what was described as a management-labor recommendation developed under the auspices of ODT. This recommendation was construed by the district court (CR. 369) as referring to trainee service as "pre-employment" service. It is submitted that this was a patent misconstruction of the recommendation. Careful examination of the text makes it clear that the recommendation distinguished sharply between off-job training and on-the-job training; that trainee service was referred to as on-the-job training; and that the term "pre-employment training" was applied exclusively to off-the-job training preceding entry upon the job either for trainee service or regular service. It thus appears that such inferences as are

to be drawn from this item of evidence point to a diametrically opposite conclusion from that drawn by the district court.

CONCLUSION

The decision below cannot be supported except on a construction which virtually reads Section 3(g) out of the Act. No such limitation is necessary; the language of the Act can properly be given its natural meaning, so long as it is understood from the context that the work referred to is the employer's work. When this is done the record, including the findings of the district court undisturbed on appeal, makes it plain that the trainees involved are employees. It is particularly important that this course be followed where, as here, any other course would confront the courts rather than the Administrator with the task of shaping the requirements of the Act to the infinitely varying circumstances of learner employment. The taking over of this task by the courts would frustrate the clearly expressed intent of Congress and would be detrimental to sound judicial administration.

Respectfully submitted,

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January 15, 1947.

APPENDIX

Organizations represented in the Railway Labor Executives' Association:

Brotherhood of Locomotive Firemen & Enginemen.
Order of Railway Conductors of America.
Switchmen's Union of North America.
Order of Railroad Telegraphers.
American Train Dispatcher's Association.
Railway Employes' Department, A. F. of L.*
International Association of Machinists.
International Brotherhood of Boilermakers, Iron Ship Builders & Helpers of America.
International Brotherhood of Blacksmiths, Drop Forgers and Helpers.
Sheet Metal Workers' International Association.
International Brotherhood of Electrical Workers.
Brotherhood Railway Carmen of America.
International Brotherhood of Firemen & Oilers.
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.
Brotherhood of Maintenance of Way Employes.
Brotherhood of Railroad Signalmen of America.
National Organization Masters, Mates & Pilots of America.
National Marine Engineers' Beneficial Association.
International Longshoremen's Association.
Hotel and Restaurant Employees' International Alliance and Bartenders International League of America.

* Not counted as one of the 19 organizations since it represents certain other organizations individually listed.

SUPREME COURT OF THE UNITED STATES

No. 335.—October Term, 1946.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner, v. The Nashville, Chattanooga & St. Louis Railway.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 17, 1947.]

Mr. Justice Black delivered the opinion of the Court.

The petitioner, Administrator of the Wage and Hour Division, United States Department of Labor, filed this action in a Federal District Court to enjoin alleged violations by the respondent railroad of §§ 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act. 52 Stat. 1060, 1068. These sections require that minimum wages be paid to employees covered by the Act and that appropriate records be kept concerning their employment and pay. The railroad was charged with having violated the Act with regard to two types of alleged employees: First, persons in training to become yard and main line firemen, brakemen, and switchmen; second, others in training to become clerks, stenographers, callers, messengers, and other similar general miscellaneous workers. The District Court held that the first group were not "employees" and therefore were not covered by the Act. On this ground alone the injunction was denied as to them. It also denied relief as to the second group, clerks, etc., partly on this same ground. Another ground for denying relief as to the second group was the court's finding that the railroad "for several years past has been complying with the Act as to them and apparently intends in good faith to do so in the future." 60 F. Supp. 1004, 1007–1008. The Circuit

Court of Appeals affirmed. 155 F. 2d 1016, one judge dissenting. We granted certiorari because of the importance of the questions decided. — U. S. —.

The finding of the District Court that the railroad had been complying with the Act in good faith in its business relations with the trainee clerks, stenographers, etc. is not challenged. No argument is here made that this is not adequate support for denial of the relief granted as to this second group. Under these circumstances, we affirm the court's action in denying an injunction to enjoin violations of the Act as to these trainees. We therefore do not reach the question as to whether this group as a whole or any of the persons in it were or were not employees under the Act.

The sole ground for denying relief as to the persons training to become firemen, brakemen, and switchmen was that they were not employees. The findings of fact here as to the training of these trainees are in all relevant respects practically identical with the findings of fact in *Walling* v. *Portland Terminal Company* No. 336, this day decided. These findings of fact are not challenged. For the reasons set out in that opinion we hold that the Circuit Court of Appeals was not in error in holding that the persons receiving training in order to become qualified for employment as firemen, brakemen, and switchmen, are not employees within the meaning of the Fair Labor Standards Act.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 336.—October Term, 1946.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner, *v.* Portland Terminal Company, Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[February 17, 1947.]

Mr. Justice Black delivered the opinion of the Court.

This is an action brought by petitioner against respondent in a Federal District Court to enjoin an alleged violation of §§ 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act, 52 Stat. 1060, 1068, 29 U. S. C. §§ 215 (a) (2), (5) which requires as to the employees covered by the Act the maintenance of records concerning their wages and the payment to them of minimum wages. The District Court denied the injunction on the ground that the particular persons involved were not employees, 61 F. Supp. 345, and the Circuit Court of Appeals affirmed on the same ground, one judge dissenting. 155 F. 2d 215. See also *Walling* v. *Jacksonville Terminal Co.*, 148 F. 2d 768. Certiorari was granted because of the importance of the questions involved to the administration of the Act. — U. S. —. The findings of fact by the District Court, approved by the Circuit Court of Appeals, and not challenged here, show:

For many years the respondent railroad has given a course of practical training to prospective yard brakemen. This training is a necessary requisite to entrusting them with the important work brakemen must do. An applicant for such jobs is never accepted until he has had this preliminary training, the average length of which is seven or eight days. If accepted for the training course, an

applicant is turned over to a yard crew for instruction. Under this supervision, he first learns the routine activities by observation, and is then gradually permitted to do actual work under close scrutiny. His activities do not displace any of the regular employees, who do most of the work themselves, and must stand immediately by to supervise whatever the trainees do. The applicant's work does not expedite the company business, but may, and sometimes does, actually impede and retard it. If these trainees complete their course of instruction satisfactorily and are certified as competent, their names are included in a list from which the company can draw when their services are needed. Unless they complete the training and are certified as competent, they are not placed on the list. Those who are certified and not immediately put to work constitute a pool of qualified workmen available to the railroad when needed. Trainees received no pay or allowance of any kind prior to October 1, 1943. At that time, however, the respondent and the collective bargaining agent, the Brotherhood of Railroad Trainmen, agreed that, for the war period, men who proved their competency and were thereafter listed as accepted and available for work as brakemen, should be given a retroactive allowance of $4 per day for their training period. The findings do not indicate that the railroad ever undertook to pay, or the trainees ever expected to receive, any remuneration for the training period other than the contingent allowance.

The Fair Labor Standards Act fixes the minimum wage that employers must pay all employees who work in activities covered by the Act. There is no question but that these trainees do work in the kind of activities covered by the Act. Consequently, if they are employees within the Act's meaning, their employment is governed by the minimum wage provisions. But in determining who are "employees" under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. See *N. L. R. B.*

v. *Hearst Publications*, 322 U. S. 111, 128–129. This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category. See *United States* v. *Rosenwasser*, 323 U. S. 360, 362–363.

Without doubt the Act covers trainees, beginners, apprentices, or learners if they are employed to work for an employer for compensation. This is shown by § 14 of the Act which empowers the Administrator to grant special certificates for the employment of learners, apprentices and handicapped persons at less than the general minimum wage.* The language of this section and its legislative history reveal its purpose. Many persons suffer from such physical handicaps, and many others have so little experience in particular vocations that they are unable to get and hold jobs at standard wages. Consequently, to impose a minimum wage as to them might deprive them of all opportunity to secure work, thereby defeating one of the Act's purposes, which was to increase opportunities for gainful employment. On the other hand, to have written a blanket exemption of all of them from the Act's provisions might have left open a way for wholesale evasions. Flexibility of wage rates for them was therefore provided under the safeguard of adminis-

*"The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under Section 6 and subject to such limitations as to time, number, proportion and length of service as the Administrator shall prescribe, . . ." § 14 (1) Fair Labor Standards Act, 52 Stat. 1060, 1068, 29 U. S. C. § 214 (1). See also § 13 (a) (7). § 14 (2) provides that handicapped persons may be employed at less than minimum wages where the Administrator permits. 52 Stat. 1060, 1068, 29 U. S. C. § 214 (2).

trative permits. This section plainly means that employers who hire beginners, learners, or handicapped persons, and expressly or impliedly agree to pay them compensation, must pay them the prescribed minimum wage, unless a permit not to pay such minimum has been obtained from the Administrator. On the other hand, the section carries no implication that all instructors must either get a permit or pay minimum wages to *all* learners; the section only relates to learners who are in "employment." And the meaning of that term is found in other sections of the Act.

Section 3 (g) of the Act defines "employ" as including "to suffer or permit to work" and § 3 (e) defines "employee" as "any individual employed by an employer." The definition "suffer or permit to work" was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. Otherwise, all students would be employees of the school or college they attended, and as such entitled to receive minimum wages. So also, such a construction would sweep under the Act each person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit. But there is no indication from the legislation now before us that Congress intended to outlaw such relationships as these. The Act's purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage. The definitions of "employ" and of "employee" are broad enough to accomplish this. But, broad as they are, they cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction. Had these trainees taken courses in rail-

roading in a public or private vocational school, wholly disassociated from the railroad, it could not reasonably be suggested that they were employees of the school within the meaning of the Act. Nor could they, in that situation, have been considered as employees of the railroad merely because the school's graduates would constitute a labor pool from which the railroad could later draw its employees. The Fair Labor Standards Act was not intended to penalize railroads for providing, free of charge, the same kind of instruction at a place and in a manner which would most greatly benefit the trainees.

Accepting the unchallenged findings here that the railroads receive no "immediate advantage" from any work done by the trainees, we hold that they are not employees within the Act's meaning. We have not ignored the argument that such a holding may open up a way for evasion of the law. But there are neither findings nor charges here that these arrangements were either conceived or carried out in such a way as to violate either the letter or the spirit of the minimum wage law. We therefore have no case before us in which an employer has evasively accepted the services of beginners at pay less that the legal minimum without having obtained permits from the Administrator. It will be time enough to pass upon such evasions when it is contended that they have occurred.

Affirmed.

MR. JUSTICE FRANKFURTER, concurring.

In this case, as well as in the companion case, No. 335, we have a judgment of two courts based on findings with ample evidence to warrant such findings. It was solely on this ground that I agreed to affirmance in *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590, and on this basis alone I think the judgments in both these cases, Nos. 335 and 336, should be affirmed.

SUPREME COURT OF THE UNITED STATES

No. 336.—October Term, 1946.

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Petitioner,

v.

Portland Terminal Company, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[February 17, 1947.]

Mr. Justice Jackson, concurring.

I, too, would affirm this judgment. But my reason is not that stated in the Court's opinion.

I have never understood that the Fair Labor Standards Act was intended or fitted to regulate labor relations, except to substitute its own minimum wage rate for any that was substandard and an overtime rate for hours above the number it set. It, of course, like other statutes, can and should be applied to strike down sham and artifice invented to evade its commands.

But the complex labor relations of this country, which vary from locality to locality, from industry to industry, and perhaps even from unit to unit of the same industry, were left to be regulated by collective bargaining under the National Labor Relations Act. It would be easy to demonstrate from the Act's legislative history that such was the intention of Congress and that it had good grounds to believe this the tenor of the legislation. Organized employees on one side, free of employer domination or coercion, and employers on the other side best know the needs and customs of their trades; they know something of the strain their industry can stand; and after all, it is they who feel the effects. Given thus the machinery to change customs that had outlived their time or, in the alternative, to adjust wage rates to take account of those customs, it was, I think, our duty to pay at least some deference to the customs and contracts of an industry and not to apply the Fair

Labor Standards Act to put industry and labor in a legal strait jacket of our own design.

From the beginning it was apparent that there were but two ways of giving real force and meaning to this Act without throwing all industry and labor into strife and litigation. One was to give decisiveness and integrity in borderline cases to collective bargaining. *Cf. J. I. Case Co.* v. *N. L. R. B.*, 321 U. S. 332; *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342. The other was to give strength and where possible decisiveness in doubtful cases to the studied rulings of the Administrator, as the Court also at moments seemed inclined to do. *Armour & Co.* v. *Wantock*, 323 U. S. 126; *Skidmore* v. *Swift & Co.*, 323 U. S. 134. Both of these considerations as bases for decision were thrown to the four winds in *Jewell Ridge Corp.* v. *United Mine Workers*, 325 U. S. 161.

This Court has foreclosed every means by which any claim, however dubious, under this statute or under the Court's elastic and somewhat unpredictable interpretations of it, can safely or finally be settled, except by litigation to final judgment. We have held the individual employee incompetent to compromise or release any part of whatever claim he may have. *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697; *cf. D. A. Schulte, Inc.* v. *Gangi*, 328 U. S. 108. Then we refused to follow the terms of agreements collectively bargained. *Jewell Ridge Corp.* v. *United Mine Workers*, 325 U. S. 161. No kind of agreement between the parties in interest settling borderline cases in a way satisfactory to themselves, however fairly arrived at, is today worth the paper it is written on. Interminable litigation, stimulated by a contingent reward to attorneys, is necessitated by the present state of the Court's decisions.

In the view that the judicial function should pay some deference to findings of fact as to customs of industry in applying this Act, I favored affirmance of the award to miners in the case of *Tennessee Coal Co.* v. *Muscoda Local*,

321 U. S. 590, because two lower courts had made findings of fact that under the contracts and conditions in those particular iron mines the employees were entitled to have counted as working time certain periods spent in travel. The judgment was supported, too, by the rulings of the Administrator. Those reasons were rejected by a majority of the Court which went on to lay down rules of decision which take no account of contract or custom.

Then came the case of *Jewell Ridge Corp.* v. *United Mine Workers*, 325 U. S. 161, in which the relationships were fixed by a deep rooted custom in the industry of which both parties took account and embodied in collective bargaining agreements and which was reflected in the Administrator's rulings made at the request of the very union that was repudiating them. But a majority of the Court again rejected the contention that this Act was not intended to interfere with long-established customs which entered into collective wage agreements, and it reaffirmed a flat declaration as follows:

> "But in any event it is immaterial that there may have been a prior custom or contract not to consider certain work within the compass of the workweek or not to compensate employees for certain portions of their work. The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him only for a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights." 325 U. S. at 167; *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590, 602.

The same doctrine was then pressed into other fields of industry by the decision in *Anderson* v. *Mount Clemens Pottery Co.*, 328 U. S. —, June 10, 1946, which declared

certain time spent on the premises of the Pottery Company must be compensated "regardless of contrary custom or contract." Slip opinion, p. 8.

The Court evidently stands upon and reiterates the basic doctrine that the Act is one to regulate industry labor relations, for it says: "This Act contains its own definitions comprehensive enough to require its application to many persons and working relationships which prior to this Act were not deemed to fall within an employer-employee category."[1]

The claimants now before us ask to participate in the judicial largess. They believe that they are entitled to be paid for the time that they spent on the railroad's premises, under the railroad's direction, performing railroad labor, in order to learn to qualify for railroad jobs when the railroad might need them. The Court does not even attempt to distinguish the foregoing cases on which their claim is based.

This case again requires us to make a choice between grounds of decision similar to the choice that was open to us in the cited cases and I think it is timely for the Court to reconsider its approach to cases under this Act. We may purport to find grounds for denying these claims in an interpretation of the Act, although Congress never intended to regulate the subject at all. Or we can use as valid ground for denying these claims the concurrent findings by two lower courts of a good faith understanding of the parties, following a long-established custom of an industry whose labor relations have long been subject to collective bargaining. I concur only on the latter ground.

[1] I did not understand when I concurred in *United States* v. *Rosenwasser*, 323 U. S. 360, that it so held. It applied the Act to piecework employees. Piecework employment is a well-known form of employment that has existed perhaps as long as employment at a fixed hourly or daily wage. I understood, and still understand, the *Rosenwasser* case to hold only that this form of employment is not excluded from the terms of the Act.